
COMMONWEALTH OF MASSACHUSETTS

The Appeals Court

SUFFOLK, SS.

No. 2016-P-0965

STATE BOARD OF RETIREMENT,
Plaintiff-Appellant,

v.

BRIAN O'HARE, AND THE JUSTICES OF THE
CAMBRIDGE DISTRICT COURT.,
Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE SUFFOLK COUNTY SUPERIOR COURT

**BRIEF OF THE APPELLANT
STATE BOARD OF RETIREMENT**

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ISSUE PRESENTED

The defendant, Brian O'Hare, was a State Police Sergeant when he committed the federal crime of using the internet to attempt to entice a person under eighteen to engage in unlawful sexual activity, for which he was subsequently convicted. This case presents the question whether the Retirement Board correctly ordered forfeiture of Sergeant O'Hare's retirement allowance, under G. L. c. 32, § 15(4), where his crime violated the core tenets of the position of State Police trooper and the rules and regulations governing the position.

STATEMENT OF THE CASE

This is an appeal by the plaintiff, State Board of Retirement ("the Board"), from a final judgment of the Superior Court concluding that the conviction of the defendant, Brian O'Hare ("O'Hare"), of the crime of using the internet to attempt to entice a person under eighteen to engage in unlawful sexual activity, did not require forfeiture of his retirement benefits under G. L. c. 32, § 15(4). That statute provides, in relevant part, that "[i]n no event shall any member [of the retirement system] after final conviction of a criminal offense involving violation of the laws

applicable to his office or position, be entitled to receive a retirement allowance.”¹

In this case, the Board determined that O’Hare, a State Police Sergeant, had in fact been convicted by means of a guilty plea in the United States District Court; that the criminal offense in question constituted a “violation of the laws applicable to his office or position;” and therefore that his accumulated total deductions should be returned and he should receive no retirement allowance. (RA 257-266, 303-323.) A judge of the District Court reversed that decision and this judgment was upheld on certiorari review by a judge of the Superior Court. This appeal by the Board followed. (RA 2, 20, 23-28, 66, 670-676.)

Resolution of the appeal requires consideration of when a law enforcement officer commits a crime that involves violation of laws applicable to his position, particularly when the crime was committed while he was off-duty. Analogous questions, outside the law enforcement context, have arisen in recent decisions

¹ In such event, the member or his beneficiary receives his accumulated deductions, but without interest. See G.L. c. 32, § 15(4).

of the Supreme Judicial Court. See Garney v. Massachusetts Teachers' Retirement Sys., 469 Mass. 384, 385 (2014); Retirement Bd. of Somerville v. Buonomo, 467 Mass. 662, 663 (2014); State Board of Retirement v. Bulger, 446 Mass. 169, 169 (2006).

A. Prior Proceedings

Following his plea and conviction of violating 18 U.S.C. § 2422 (b) (use of internet to attempt to entice child under age 18 to engage in unlawful sexual activity) and his accompanying dishonorable discharge from the State Police force, Sergeant O'Hare applied for a superannuation retirement allowance. A hearing thereon was conducted by a hearing officer who recommended that the application be denied under the provisions of G. L. c. 32, § 15(4). In a written decision, the hearing officer concluded that Sergeant O'Hare's criminal offense violated laws directly applicable to his position as a State Police trooper governed by State Police Rules and Regulations that required that he protect the public safety, take reasonable steps to stop crime (including intervening when a crime is in progress), uphold the law, and conform to standards essential to the operation of the State Police. The hearing officer's recommendation

was adopted by the Board, and Sergeant O'Hare's retirement application was denied. (RA 257-266, 267-272, 302-323.)

Sergeant O'Hare timely filed a complaint for judicial review in the District Court. (RA 19, 192-247.) See G. L. c. 32, § 16(3). Following a review of the administrative record, a judge of the District Court allowed Sergeant O'Hare's motion for judgment on the pleadings, and reversed the Board's decision on the ground that Sergeant O'Hare's offense did not involve any violation of law applicable to his State Police position. (RA 20, 23-28, 248-667.)

Thereupon, the Board filed in the Superior Court a complaint for certiorari review of the otherwise final District Court judgment. (RA 2, 4-10.) See G. L. c. 249, § 4. On cross motions for judgment on the pleadings, a judge of the Superior Court likewise determined that Sergeant O'Hare's offense did not implicate the laws applicable to his position; allowed Sergeant O'Hare's motion; and entered a judgment upholding the District Court's reversal of the Board's decision. (RA 2, 670-675.) The Board filed a timely notice of appeal to the Appeals Court. (RA 2, 676.)

B. Statement of Facts

The relevant facts are not disputed. Sergeant O'Hare graduated from the State Police Academy in December, 1986 and was a trooper with the State Police for twenty years. At the time of his arrest, he held the rank of Sergeant and served as a patrol supervisor and shift commander. (RA 307-308, 623-624.)

On August 29, 2005, Sergeant O'Hare, while off-duty, used his home computer to access, using a pseudonym, an internet chat room entitled "SCHOOLBOIS SHOWERSM4." On the same day, he sent an unsolicited message to a specific person in the chat room who had represented himself as a fourteen-year-old high school freshman beginning the ninth grade. In fact, the "boy" was an undercover FBI agent. (RA 310, 445-446, 568-569.)

During the next seven months, Sergeant O'Hare, still using his own computer, engaged the "boy" with instant messages and emails in which O'Hare encouraged the development of a sexual relationship, including giving him sexually explicit advice, asking to meet him, telling him he could teach him about sex, expressing concern over their age difference, and exchanging photographs. Eventually, they arranged to

meet at a location in Medford. (RA 310, 445-446, 568-569.)

On February 24, 2006, Sergeant O'Hare traveled to the agreed-upon meeting place where he was arrested by FBI agents. He was subsequently indicted by a grand jury on one count of attempting to use the internet to coerce or entice a minor to engage in unlawful sexual activity. On October 23, 2006, he was dishonorably discharged from the State Police. On February 27, 2007, he pleaded guilty to the charge, and he was sentenced to a sixty-month prison term followed by five years of supervised release. (RA 309-311, 417-422, 424-434, 437-458, 553-555, 563.)

As in the case of all State Police troopers, Sergeant O'Hare took an oath to faithfully perform his duties and to abide by State Police rules and regulations. (RA 307, 459-460.) See G. L. c. 22C, § 15. Pursuant to G. L. c. 22C, §§ 3 and 10, the Colonel of the State Police has promulgated rules and regulations that function as a code of conduct. (RA 307-309, 459-460, 461-508.) Among other things, the regulations require that troopers avoid conduct "which brings the Massachusetts State Police into disrepute" or "reflects discredit upon the person as a member of

the Massachusetts State Police," or "that which impairs the operation, efficiency, or effectiveness" of the force or the member; troopers "shall obey all laws of the United States and of any country, state, or local jurisdiction in which the [trooper is] present;" and, while off-duty, troopers "shall not associate with individuals they know or should know are engaged in criminal activities" and "shall not . . . remain at any place where they know or should know criminal activity is occurring." (RA 483.) The regulations state that troopers shall be on call twenty-four hours a day and shall take action when criminal activity comes to their attention whether they are on or off-duty. (RA 464, 481.)

ARGUMENT

I. THE STATUTE REQUIRES FORFEITURE WHEN THE MEMBER'S OFFENSE CONFLICTS WITH AN ESTABLISHED FUNCTION OF HIS OFFICE OR POSITION.

Judicial review in an action in the nature of certiorari under G. L. c. 249, § 4, is limited. A court may "correct only a substantial error of law, evidenced by the record, which adversely affects a material right of the plaintiff. . . . [T]he court may rectify only those errors of law which have resulted in manifest injustice to the plaintiff or

which have adversely affected the real interests of the general public.” Retirement Bd. of Somerville v. Buonomo, 467 Mass. 662, 668 (2014) (internal quotations and citations omitted). Here, the Superior Court erred when it failed to overturn the District Court’s decision that effectively reinstated Sergeant O’Hare’s retirement allowance, contrary to the requirements of G. L. c. 32, § 15(4), as construed by the Board.

General Laws chapter 32, § 15(4), is a legislative response to Collatos v. Boston Retirement Bd., 396 Mass. 684, 687-688 (1986). In the Collatos decision, the Supreme Judicial Court construed G. L. c. 32, § 15(3A), and concluded that forfeiture of retirement benefits was required only in the event of a conviction of one of two offenses actually referred to in that section.² Ibid. The Legislature then expanded the coverage of the forfeiture statute. See

² The offenses referred to in section 15(3A) are those “set forth in section two of chapter two hundred and sixty-eight A or section twenty-five of chapter two hundred and sixty-five pertaining to police or licensing duties.” Because Collatos was convicted under the Hobbs Act, a Federal statute, the Supreme Judicial Court concluded that section 15(3A) was inapplicable. Collatos, 396 Mass. at 687-688.

Gaffney v. Contributory Retirement Appeal Bd., 423 Mass. 1, 3 (1996) ("Shortly after our decision [in Collatos] the General Court enacted St. 1987, c. 679, § 47 which inserted G. L. c. 32, § 4,³ providing for an intermediate level of pension forfeiture in a broader array of circumstances.")

Section 15(4) expands those offenses for which conviction will result in pension forfeiture by providing: "In no event shall any member after final conviction of a criminal offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance."

[Emphasis supplied.] By means of this language, "[t]he General Court undoubtedly intended to broaden the range of crimes that would lead to pension forfeiture." Gaffney, 423 Mass. at 3-4. At the same time, "the General Court did not intend pension forfeiture to follow as [an automatic consequence] of any and all criminal convictions. Only those violations related to the member's official capacity

³ As appearing in the published reports, this is plainly a typographical error. The reference throughout the opinion is to G. L. c. 32, § 15(4) and that was obviously intended in this sentence as well. Indeed, the typographical error does not appear in the electronically published report in Westlaw.

were targeted.” Garney, 469 Mass. at 389, quoting Gaffney, 423 Mass. at 4-5. In determining whether a given offense falls within the scope of forfeiture, the statute, which is penal in its nature and effect, shall be construed strictly. See State Bd. of Retirement v. Bulger, 446 Mass. at 174-175.

Thus, forfeiture will follow in the event that there is a relationship of some kind between the member’s criminal offense and the office or position that he holds. The Supreme Judicial Court has construed the statute as requiring that the criminal activity be connected with the member’s office or position, or that there be a direct link between the two. Garney, 469 Mass. at 389, citing Gaffney, 423 Mass. at 4-5.

Cases decided by our appellate courts have addressed what the connection or direct link between the offense and the member’s official position must be in order for there to be a forfeiture of retirement benefits. “[T]he conduct must either directly involve the position or be contrary to a central function of the position as articulated in applicable laws, thereby creating a direct link to the position.” Garney, 469 Mass. at 391. The central functions of a

position can be derived from a code of conduct imposed on the member under legal authority. See Bulger, 446 Mass. at 177 ("the code [of professional responsibility for clerks of the courts] imposes on a clerk-magistrate a significant responsibility for upholding the integrity of the judicial system, for promoting public confidence in the administration of justice, for honoring the public trust placed in such office, for avoiding the appearance of any impropriety in his activities, and for fulfilling the mandates of the oath of office."); cf. Garney (not sufficient that public school teacher, although holding a position of special public trust," convicted of possession of child pornography on home computer). As demonstrated by the cases discussed below, where, as here, the crime committed is inconsistent with what is required of the member in his public position the forfeiture statute applies.

A. CASES UPHOLDING FORFEITURE UNDER G.L. c. 32, § 15(4) SUPPORT THE BOARD'S DECISION TO FORFEIT SERGEANT O'HARE'S RETIREMENT ALLOWANCE.

In Gaffney v. Contributory Retirement Appeal Bd., 423 Mass. 1 (1996), the Court considered a guilty plea by the superintendent of a municipal water and sewer department to charges that he embezzled state funds

that he was required to safeguard as part of his official responsibilities. Id. at 4. In this, the first case to reach the Supreme Judicial Court after enactment of G. L. c. 32, § 15(4), the Court concluded that “[t]he substantive touchstone intended by the General Court is criminal activity connected with the office or position.” Ibid. The Court had little difficulty in determining that embezzlement of funds from one’s own office required forfeiture under the new statute. Ibid.

The statute was addressed next in MacLean v. State Bd. of Retirement, 432 Mass. 339 (2000), wherein the Court addressed a guilty plea by a member of the General Court to two misdemeanor violations of G. L. c. 268A, § 7 (rendering criminal, apart from certain exceptions, knowingly obtaining a financial interest in a contract made by a state agency in which the Commonwealth or a state agency is an interested party). Neither the plaintiff nor the Court questioned whether a criminal conflict of interest committed by a legislator “involve[ed] violation of the laws applicable to his office” for the purpose of section 15(4). The case focused on other issues,

including whether the statute was unconstitutional as applied. Id. at 344-352.

While the Court was not called upon to interpret the statute in any meaningful way, the justices did not at any point question that the statute applied to the offense. With Gaffney, 423 Mass. at 4, having been decided only four years earlier (the “substantive touchstone . . . is criminal activity connected with the office or position”), it was apparently considered a given that conflicts of interest regarding state contracts implicated and were inconsistent with the official responsibilities of a state legislator.

In State Bd. of Retirement v. Bulger, 446 Mass. 169 (2006), a clerk-magistrate of the juvenile court was convicted of two counts of perjury and two counts of obstruction of justice. In a decision with particular relevance to the present case, the Court concluded that the defendant “did violate the laws applicable to his office and that, consequently, forfeiture of his pension was statutorily required.” Ibid.

In Bulger, the defendant lied to a grand jury regarding communications with his brother, a fugitive, as well as with respect to his knowledge of his

brother's assets. Id. at 171. A municipal court judge ruled that the offenses, while obviously serious, were unrelated to the office of clerk-magistrate, and that "the facts . . . that gave rise to the convictions did not involve the administration of his duties and responsibilities as an appointed government official." Id. at 172. The Supreme Judicial Court examined the legally imposed functions of clerk-magistrate and disagreed.

The Court looked first at various statutory provisions that governed those functions.⁴ These include, beside internal administration of the office, significant judicial-type responsibilities such as receiving complaints, administering oaths to complainants and witnesses, issuing warrants and summonses, deciding small claims, holding show cause hearings, and setting bail, among others. "The responsibilities of a clerk-magistrate, while largely ministerial, are inextricably related and essential to the effective functioning of the courts." Bulger, 446 Mass. at 176, quoting Commonwealth v. Clerk-Magistrate of the W. Roxbury Div. of the Dist. Court Dep't, 439

⁴ See, among others, G. L. c. 218, §§ 8, 33, 35A, 58; G. L. c. 221, §§ 62B, 62C; c. 276, §§ 57, 58.

Mass. 352, 359 (2003). In describing the fundamental duties of a clerk-magistrate, the Court also relied heavily on case law describing those duties. Bulger, 446 Mass. at 175-177.

As an additional source of authority that defines the clerk-magistrate's office, the court relied on the Code of Professional Responsibility for Clerks of the Courts contained in S.J.C. Rule 3:12 ("the code"). The Supreme Judicial Court is empowered to establish by rule "standards of conduct for judicial employees and officials." See Opinion of the Justices, 375 Mass. 795, 813 (1978). "[T]he code imposes on a clerk-magistrate a significant responsibility for upholding the integrity of the judicial system." Bulger, 446 Mass. at 177.

Arguably, Bulger's offenses were committed in a personal matter, i.e., to protect the interests of his fugitive brother. And Bulger did not use his office to facilitate his crimes. But the Court rejected the effort to insulate such offenses from the reach of the forfeiture statute where those offenses implicated the functions of the member's office. "The nature of Bulger's particular crimes cannot be separated from the nature of his particular office when what is at

stake is the integrity of our judicial system.” Id. at 180. Accordingly, the Court concluded that, in these circumstances, perjury and obstruction of justice convictions involved violations of law applicable to the office of the clerk-magistrate, and that section 15(4) mandated forfeiture of retirement benefits. Ibid.⁵ Put differently, perjury and obstruction of justice strike directly at the lawful requirements that are applicable to a senior officer of an institution whose objective is the doing of justice and the employment of truthful testimony to achieve that end.

Other decisions that have concluded that a criminal offense satisfied the requirement of section 15(4) depend on reasoning and considerations that are consistent with Bulger. In Durkin v. Boston Retirement Bd., 83 Mass. App. Ct. 116, rev. denied,

⁵ The Court rejected the proposition that offenses sufficient to justify a member’s removal from office were alone sufficient to require pension forfeiture, pointing out that the standards for requiring forfeiture of a retirement allowance are stricter. Bulger, 446 Mass. at 178. The Board does not assert otherwise in the present case. On the other hand, a member’s violation of the standards and requirements governing the office or position certainly is germane to whether he violated the fundamental tenets of the office.

464 Mass. 1107 (2013), an intoxicated off-duty police officer shot a fellow officer with a department-issued firearm that he was lawfully entitled to carry. He subsequently pleaded guilty to a charge of assault and battery with a dangerous weapon. The local retirement board denied his application for superannuation retirement, and the District Court affirmed, stating that “laws prohibit[ing] . . . assault and battery by means of [a] dangerous weapon [were] certainly applicable to police officers . . . who have specific rules and regulations regulating their use.” Id. at 116-117. The Appeals Court agreed. Its analysis and language are particularly meaningful in the present case. Citing Attorney Gen. v. McHatton, 428 Mass. 790, 793-794 (1999), the court stated: “Police officers must comport themselves in accordance with the laws that they are sworn to enforce.” The Court turned then to Bulger, supra, for the proposition that the fact that misconduct is committed with respect to what is arguably a personal matter is irrelevant where the offenses violate “fundamental tenets” of an applicable code of conduct. Bulger, 446 Mass. at 179. The Appeals Court added: “Here, Durkin engaged in the very type of criminal behavior he was required by law

to prevent. This violation was directly related to his position as a police officer as it demonstrated a violation of the public's trust as well as a repudiation of his official duties." Durkin, 83 Mass. App. Ct. at 119 (emphasis supplied). And, in describing the laws applicable to the position of a police officer, the Court referred to the Boston Police Department Rules and Procedures on Use of Deadly Force, Rule 303, § 5 and § 6. Durkin, 83 Mass. App. Ct. at 119 n.4. See also Maher v. Justices of the Quincy Div. of the Dist. Court Dep't, 67 Mass. App. Ct. 612, 613-614, 616-617 (2006), rev. denied, 448 Mass. 1105 (2007) (chief plumbing and gas inspector of a municipality broke into city hall personnel office, stole one or more documents from his personnel file (in attempt to influence appointment process by removing unfavorable information), and was convicted of breaking and entering, wanton destruction of property, and larceny; pension forfeiture upheld due to "multiple, direct links between the criminal offenses here and the plaintiff's office or position.")

The most recent case in which the Supreme Judicial Court has concluded that criminal offenses

were linked directly to the lawful parameters of the public position is Retirement Bd. of Somerville v. Buonomo, 467 Mass. 662 (2014). There, a former register of probate of Middlesex County pleaded guilty to various charges arising from his theft of cash from photocopiers located at the Registry of Deeds in an area that adjoined the Registry of Probate. Id. at 664-666. The Court held that the defendant had violated laws applicable to the office of register of probate, thereby forfeiting his entitlement to a retirement allowance under G. L. c. 32, § 15(4). Id. at 672. The Court concluded that the thefts, although not necessarily of property within the defendant's responsibility, constituted a "violation of the laws applicable to his office or position."

In so finding, the Court quoted Gaffney, 423 Mass. at 4, to the effect that section 15(4) is not limited to "highly specialized crimes addressing official actions." Rather, the facts of each case are examined. Here, the Court looked first to statutes and case law governing the office of register of probate, see G. L. c. 217, §§ 4, 5A, 15, and characterized the register's duties as "in the main concerned with administering justice." Buonomo, 467

Mass. at 670, quoting Opinion of the Justices, 300 Mass. 596, 598 (1938).

The Court then found further support for the proposition that the lawful requirements of the register's office were implicated in the Code of Professional Responsibility for Clerks of the Courts, S.J.C. Rule 3:12, which defines "norms of conduct and practice appropriate to persons serving in the positions covered by the [c]ode." Ibid. The code, in Canon 2, provides that a register "shall comply with the laws of the Commonwealth." Id. at 671. The Court concluded that, by pleading guilty to larceny and embezzlement by a public officer, Buonomo violated Canon 2 and this, therefore, constituted violation of the laws applicable to his office. Ibid.

These cases illuminate "the substantive touchstone" intended by enactment of section 15(4), which is "criminal activity connected with the office or position." Gaffney, 423 Mass. at 4. The connection arises not simply because an officer or employee violates the criminal law, but when that violation conflicts with reasonable expectations regarding that individual's obligation to carry out his public functions appropriately. Thus, theft from

one's own agency (Gaffney) is plainly inconsistent with the responsibilities of a municipal superintendent. Likewise, the ability of a state legislator to act on public policy questions objectively is compromised by conflicts of interest (MacLean). Theft of personnel papers in order to enhance the employee's likelihood of obtaining reappointment (Maher) plainly implicates doubt that the employee will function effectively should he succeed in remaining in his position. And theft of public funds, even from another agency (Buonomo), "compromises the integrity of and public trust in the office of register of probate," id. at 671.

In the same way, certain offenses strike directly at the heart of how a member's public position is expected to function. Lying to a grand jury (Bulger) is plainly inconsistent with holding a senior position in the judicial system, the functions of which are dependent on truth-telling. While the Court refers to a code of conduct for clerk-magistrates, such a code hardly seems necessary to establish that it is not conducive to public confidence in the courts that a perjurer be associated with the office that administers oaths to tell the truth. And in Durkin

(drunken assault and battery with a firearm on fellow police officer, contravening the laws applicable to a police officer's use of firearms), the relevance of a life-threatening offense to the officer's capacity to carry out his responsibility to enforce the criminal law was obvious.

B. CASES HOLDING THAT G.L. c. 32, § 15(4) DOES NOT APPLY ALSO SHOW THAT SERGEANT O'HARE'S CASE WARRANTS FORFEITURE.

It is useful to examine those cases in which the appellate courts have concluded that the nexus between the criminal offense and the public position is not sufficient to justify pension forfeiture under G. L. c. 32, § 15(4). The decisions show when criminal behavior does not implicate the offender's public position and demonstrate by analogy that the forfeiture statute does apply in the present case.

The most recent statement of the Supreme Judicial Court on the subject appears in Garney v. Massachusetts Teachers' Retirement Sys., 469 Mass. 384 (2014). The case dealt with a public school teacher and coach who pleaded guilty to purchasing and possessing child pornography. There were no meaningful connections to his teaching position. He used his own funds and his own computer, and did not

possess or view material that depicted any of his students. Id. at 384-386. The Court concluded that, on the specific facts of the case, his offenses “neither directly involved his position as a teacher nor contravened a particular law applicable to that position. Id. at 385.

The Court’s principal purpose was “to clarify the scope of our decision in Bulger.” Id. at 388. That case and others contained considerable language equating the violation of a “public trust” with application of section 15(4). The Court stated that “the fact that Garney’s position is one of special public trust, and that criminal conduct of the type committed by Garney violates that trust, is insufficient in and of itself to warrant forfeiture under G.L. c. 32, § 15(4).” Garney, 469 Mass. at 391. Rather, canvassing the dictionary definition for a teacher, case law, the constitution, statutes, and regulations, the Court found no violation of the central function of a teacher as described in those applicable laws in Garney’s private conduct. Id. at 394-397.

The Garney Court did not suggest that violation of a public trust is irrelevant to the analysis, only

that it is not determinative by itself. Indeed, the Court refers both to the Bulger and the Buonomo decisions with approval. In Bulger, the statute was held to apply because the defendant's criminal acts were "directly contrary to the most fundamental tenets of his position," as embodied in a code of professional responsibility. See Garney, 469 Mass. at 392. In Bulger, the Garney Court said, "the clerk-magistrate's convictions of perjury and obstruction of justice struck at the very core of the role of the clerk-magistrate and compromised the integrity of the judicial system." Garney, 469 Mass. at 395 n.12. While the distinction between actions that merely violate a "special public trust" and those that are contrary to "fundamental tenets of [a] position" may be subtle in some cases, it is not difficult to find the latter as characterizing Sergeant O'Hare's offense in the present case.

A series of Appeals Court decisions concluding that there was an inadequate nexus between the criminal offense and the public position is also instructive. In Herrick v. Essex Regional Retirement Bd., 77 Mass. App. Ct. 645 (2010), a maintenance mechanic and custodian for a local housing authority

pleaded guilty to two counts of indecent assault and battery on a child (his daughter). Id. at 646-647. Citing Gaffney, Bulger and Maher as examples of a sufficient link between offense and position, the Court observed that there had been no showing of a connection between the plaintiff's offenses and his official capacity. Id. at 654.

Similarly, in Scully v. Retirement Bd. of Beverly, 80 Mass. App. Ct. 538, 539 (2011), the Appeals Court found no link between the plaintiff's conviction of possession of child pornography and his position as director of community services at the city's public library. Relying in large part on the facts that the plaintiff did not use a library computer and he did not use his public position to facilitate the crime, the Court concluded that the facts underlying the convictions were inadequate to support the application of the forfeiture statute. Id. at 543. Obviously, however, the presence of a nexus between offense and office does not turn on the fortuity of ownership of the equipment used to commit the crime. While public ownership of such equipment may be sufficient to satisfy the statute, the absence of such ownership does not compel the opposite result.

In Scully, it is the absence of any relationship between the offense and the character and requirements of the plaintiff's position that make the result the right one.

The majority opinion in Retirement Bd. of Maynard v. Tyler, 83 Mass. App. Ct. 109, rev. denied, 465 Mass. 1101 (2013), is consistent. The defendant, a firefighter and emergency technician, pleaded guilty to various charges arising out of his sexual abuse of young boys, including the son and another relative of firefighters in the same department. The Court concluded that there was no "direct link" between the offenses and the defendant's position. Id. at 109-110. That a firefighter has an obligation to protect the public against the risks of fire does not encompass an obligation generally to protect all persons against all risks. Were it otherwise, the reach of the statute would be "so broad . . . as to engulf nearly every public official." Id. at 112-113.

Contrasting Garney and the above-described Appeals Court decisions with cases such as Bulger and Buonomo illustrate the differences between those offenses which invoke section 15(4) and those that do not. The distinctions turn on the character of the

public position and the fulfillment of the obligations associated with it. Each case must be decided on its facts. Garney, 469 Mass. at 389; Gaffney, 423 Mass. at 4-5. It is not difficult to determine that a sex offender's crime is not meaningful to his ability to perform as a custodian (Herrick); as a library community services director (Scully); as a firefighter (Tyler); or even as a teacher where the conduct was purely private and his students were not involved (Garney). It is quite different when a judicial officer commits perjury (Bulger); an elected public official steals public funds (Buonomo); or, as here, when a State Police trooper commits a serious crime involving the endangerment of minors. Such offenses directly implicate the requirements of the public position, thereby providing the "direct link" between the crime and the office.

II. COMMISSION OF THE CRIMINAL OFFENSE OF ATTEMPTING TO ENTICE A PERSON UNDER EIGHTEEN TO ENGAGE IN UNLAWFUL SEXUAL ACTIVITY IS DIRECTLY CONTRARY TO THE CENTRAL FUNCTION OF THE POSITION OF A STATE POLICE TROOPER AND SUPERVISORY OFFICER.

General Laws chapter 32, § 15(4), is applicable when criminal conduct either directly involves the member's position or is "contrary to the central function of the position as articulated in applicable

laws.” Garney, 469 Mass. at 391. It is a “central function” of a police officer that he devote his energies to the objective of preventing crime. When the officer himself becomes a lawbreaker, he acts in disregard of “the fundamental tenets” of his position. Bulger, 446 Mass. at 179.

Sworn to uphold the law, Sergeant O’Hare did the opposite. That his criminal conduct occurred while he was off-duty, and using his home computer, is of no consequence. It is not a prerequisite to application of the forfeiture statute that the member’s crime occurs on the job. What is important is that Sergeant O’Hare’s criminal conduct was egregiously inconsistent with the central function of the position of state police trooper; no other connection to that position was required.

The statute is invoked when a criminal offense “involv[es] violation of the laws applicable” to the member’s office or position. It cannot be argued even in the abstract that the commission of a criminal sex offense does not violate laws applicable to the position of a police officer. But the court need not rely on a generalized assumption, because enforceable rules are in place that establish the legal criteria

for the position. The Supreme Judicial Court has, in other pension forfeiture cases, relied on similar codes of conduct contained in enforceable rules. See Bulger, 446 Mass. at 177; Buonomo, 467 Mass. at 671.⁶

The State Police are governed by rules and regulations adopted pursuant to G. L. c. 22C, §§ 3 and 10, that function as a code of conduct. An administrative regulation that is consistent with statute has the force of law. See Town of Plymouth v. Civil Service Commission, 426 Mass 1, 5-6 (1997). The State Police regulations in question are exempt from the procedural requirements of the Administrative Procedure Act because they concern "only the internal management or discipline of the adopting agency." G. L. c. 30A, § 1(5). Before embarking on his responsibilities, Sergeant O'Hare took an oath to faithfully perform his duties and to abide by State Police rules and regulations. (RA 307, 459-460.) See G. L. c. 22C, § 15 ("[e]ach officer shall, before entering upon the performance of his duties, be sworn

⁶ In the prior cases, in order to identify the "laws applicable to [the] office or position," the appellate courts have looked to statutes, regulations, and court rules as well as case law (Bulger, Garney, Buonomo), dictionary definitions (Garney), and internal rules of conduct governing the position (Durkin).

to . . . faithful performance.") The regulations require that officers obey the law at all times; avoid conduct that interferes with police operations; not bring the State Police force into disrepute; and take action against criminal activity whether on or off-duty.⁷ (RA 307-309, 459-460, 461-508.)

The Board properly considered the Rules and Regulations of the State Police, which function as a code of conduct, as "laws applicable to the position" of State Police Trooper. See Buonomo, 467 Mass. at 671; Garney, 469 Mass. at 395-397; Bulger, 446 Mass. at 173-180. The State Police Rules and Regulations originally were "drawn up by the Commissioner [of Public Safety] and approved by the Governor in 1922, [and] originally adopted trial procedure conforming to the Manual of Courts Martial of the United States Army." O'Hara v. Comm'r of Public Safety, 367 Mass. 376, 379-380 (1975) (holding that the commissioner had statutory authority to promulgate the rules, that they describe the duties of troopers, and that both the Department and individual troopers are bound by them).

⁷ Similarly, G. L. c. 22C, § 14 prohibits employment as a trooper of any person who has been convicted of a felony.

The Rules and Regulations are currently issued by the Colonel of the State Police, who is appointed by the Governor and serves as the "executive and administrative head" of the Department of State Police. G. L. c. 22C, § 3. "The colonel shall make all necessary rules and regulations for the government of the department." G. L. c. 22C, § 3. The Rules and Regulations of the Department of State Police also are authorized by G.L. c. 22C, § 10 (the "colonel may, . . . , make rules and regulations for the force, including matters pertaining to the discipline, organization, government, training, compensation, equipment, rank structure, and means of swift transportation"). Section 10 expressly requires troopers to comply with the Department's Rules and Regulations: "Any member of said force violating any of the rules and regulations for said force shall be subject to discipline and discharge in accordance with said rules and regulations." G. L. c. 22C, § 10. (RA 470-504.)⁸

⁸ Under section 15(4), forfeiture does not automatically follow from a conviction that might justify termination from employment. See, e.g., Garney, 469 Mass. at 395-97. But, as here, the fact that criminal conduct did justify termination can be one of various factors that support a forfeiture.

Because the Rules and Regulations of the Department of State Police are "promulgated pursuant to a legislative grant of power," they have the force of law, and the Department (and its troopers) must comply with the regulations. Kenney v. Comm'r of Correction, 393 Mass. 28, 33 (1984). See also City of Boston v. Boston Police Patrolmen's Ass'n, 443 Mass. 813, 821-823 (2005) (police officer's violation of regulations issued by Boston Police Commissioner went "to the heart of his responsibilities" warranting dismissal from the force); Attorney General v. McHatton, 428 Mass. 790, 794-795 (1999) (municipal police officer discharged for misconduct in office, due to off-duty crimes, violated oath of office and departmental rules and regulations and code of ethics).⁹ Cf. Burns v. Commonwealth, 430 Mass. 444,

⁹ It is immaterial that the Department's Rules and Regulations were not promulgated as "regulations" under G. L. c. 30A. By its terms, the rulemaking process in Chapter 30A does not apply here. See G. L. c. 30A, § 1 (excluding from definition of "regulation," "regulations concerning only the internal management or discipline of the adopting agency or any other agency, and not substantially affecting the rights of or the procedures available to the public or that portion of the public affected by the agency's activities"). The Department's Rules and Regulations are, nonetheless, "laws applicable" to the State Police under §15(4), where they were promulgated pursuant to statutory authority and

450-453 (1999) (decision of State Police trial board imposing discipline on trooper overturned for board's failure to comply with State Police Rules and Regulations); Commonwealth v. Trumble, 396 Mass. 81, 88-89 (1985) (roadblock guidelines need not be issued as regulations under c. 30A but controlled State Police action). The Hearing Officer properly considered the State Police Rules and Regulations as part of the laws applicable to Sergeant O'Hare as a member of the State Police under § 15(4).

In a case outside the law enforcement context, the Supreme Judicial Court has rejected an interpretation of section 15(4) that would bring about pension forfeiture "as a consequence of any and all criminal convictions." Gaffney, 423 Mass. at 5. It could be argued that police officers are an exception to this proposition because, given the nature of the positions that they hold, the commission of any crime is directly contrary to the central functions of those positions. But it is unnecessary to go so far on this

specifically made applicable to troopers (and the Department) by G. L. c. 22C, § 10. See, in addition to the cases cited above, Town of Plymouth v. Civil Service Comm'n, 426 Mass. 1, 5-6 (1997) (personnel administrator's rule, promulgated by direction of statute, has force of law).

record. Here, Sergeant O'Hare's specific offense was directly contrary to the fundamental tenets of the position of a State Police Trooper and Sergeant, as set forth in the State Police Rules and Regulations.

The Superior Court erroneously concluded that Sergeant O'Hare's crime did not violate any law applicable to his position as a State Trooper, nor was it enough to violate a "special public trust." (RA 672-673.) To the contrary, Sergeant O'Hare's retirement allowance is subject to forfeiture under G. L. c. 32, § 15(4), because his criminal conduct was "contrary to a central function of the position as articulated in applicable laws, thereby creating a direct link to the position." Garney, 469 Mass. at 389-390. By attempting to entice a minor to engage in unlawful sexual activity, Sergeant O'Hare violated central tenets of his position as a State Trooper to protect life, prevent crime, and not bring himself or the State Police force into disrepute. (RA 483.)

Police officers are responsible for enforcing the law and protecting the public, and have a special obligation to uphold the law even while off-duty. See Clancy v. McCabe, 441 Mass. 311, 328 (2004) ("One of the most important police functions is to create and

maintain a feeling of security in communities. To that end, it is extremely important for the police to gain and preserve the public trust, maintain public confidence in the integrity of police officers, and avoid an abuse of power by law enforcement officials"); Falmouth v. Civil Serv. Comm'n, 61 Mass. App. Ct. 796, 801 (2004) ("police officers must behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel . . . This applies to off-duty as well as on-duty officers") (internal quotations and citations omitted); Local 346, Int'l Bhd. Of Police Officers v. Labor Relations Comm'n, 391 Mass. 429, 439 (1984) ("Few institutions depend as heavily on integrity and credibility for the effective performance of their duties as do police departments."). Indeed, the Court in Attorney General v. McHatton, 428 Mass. at 793, recognized that "police officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens," explaining:

Police officers must comport themselves in accordance with the laws that they are sworn to enforce *and* behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. They are required to do more than refrain from indictable conduct. Police officers are not drafted into public service; rather, they compete for their

positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.

Id. at 793-794 (internal quotations and citations omitted).

"[P]ersons who have engaged in felonious conduct may not be police officers." City of Boston v. Boston Police Patrolmen's Ass'n, 74 Mass. App. Ct. 379, 382, rev. denied, 454 Mass. 1109 (2009). Whether such conduct takes place while on-duty or off-duty, termination of a police officer from the force is required. See G. L. c. 22C, § 14; McHatton, 428 Mass. at 794-795; City of Boston v. Boston Police Patrolmen's Ass'n, 443 Mass. 813, 823 (2005) ("public policy against requiring the reinstatement of police officers who have committed felonious misconduct stems from the necessity that the criminal justice system appear legitimate to the people it serves").

Under the statutes, case law, and the Rules and Regulations governing the State Police, the commission of a felony disqualifies a trooper from continuing in his position. Such misconduct is a violation of "the very essence of the trust reposed in [a police officer] by reason of his employment, . . . conduct inimical to the most fundamental obligations imposed

by reason of his position as a police officer, a position of special public trust," Police Comm'r of Boston v Civil Service Comm'n, 22 Mass. App. Ct. 364, 371, 372 (1986) and such "actions go to the heart of [his] responsibilities," City of Boston v. Boston Police Patrolmen's Ass'n, 443 Mass. at 821. Besides requiring termination, both on-duty and off-duty criminal conduct violate the fundamental obligations of a state trooper to "behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel." McHatton, 428 Mass. at 793-794.

A conviction also "compromise[s an officer's] ability to enforce the law fully and . . . make[s an officer] a target for blackmail [and] unfairly taints the reputation of every [law-abiding] police officer [on the force]," id. at 795; causes people "not [to] trust the police - on the street or in court," City of Boston, 443 Mass. at 823; and impairs an officer's vital ability to testify in Court, since his credibility is subject to impeachment on the basis of his felony conviction, Mass. G. Evid. § 609 (2012). (In addition, a felony conviction would disqualify him from being issued a license to carry firearms, G. L.

c. 140, § 131.) Sergeant O'Hare's commission of enticement of a minor violated the "public trust," repudiated "his official duties," constituted "the very type of criminal behavior he was required by law to prevent," and "violated the integrity of the system which he was sworn to uphold." Durkin, 83 Mass. App. Ct. at 119. (And, he engaged in the conduct on numerous occasions, over the course of several months, in an on-going and necessarily secretive scheme using an alias in an anonymous computer chat room, targeting a vulnerable victim.) Sergeant O'Hare's felonious conduct also violated the oath he took to faithfully perform his duties and comply with the Rules and Regulations. G. L. c. 22C, § 15. See McHatton, 428 Mass. at 794-795. (RA 287, 437.)

Further, a fundamental tenet of a police officer's position is the duty to protect life. Durkin, 83 Mass. App. Ct. at 119 (police officer convicted of assault and battery by means of a dangerous weapon for shooting a fellow officer while off-duty lost his retirement allowance under G. L. c. 32, § 15(4) because he had violated a central tenet of his position - "at the heart of the police officer's role is the unwavering obligation to

protect life. One of the essential duties of a police officer is to protect the public at large"). See also Beal v. Bd. of Selectmen of Hingham, 419 Mass. 535, 542 (1995). "[A] police officer, [is] bound by a duty to protect life and property." Commonwealth v. Grassa, 42 Mass. App. Ct. 204, 208 (1997). As "state police are traditionally an elite force subject to more arduous duties than other policemen," Sergeant O'Hare had a solemn duty to protect the public and the reputation of the force. O'Hara, 367 Mass. at 380.

Sergeant O'Hare's duty to protect life and prevent crime is also articulated in the Massachusetts State Police Rules and Regulations. (RA 470-504.) The Regulations provide that, "it is essential that the Criminal Justice System, *upon which public safety depends*, be administered in a manner which promotes public respect, confidence and acceptance." (RA 475.) In addition to a duty to "obey all laws of the United States and of any country, state or local jurisdiction" and "know and conform to all applicable law, State Police Rules, Regulations, Policies, Procedures, Orders, and Directives," state troopers are required to "provide security and care for all persons," and "render the highest order of police

service to the citizens." (RA 480-481.) The Regulations include a Code of Ethics, which requires officers to "accept [their] responsibility to the public," "assure the safety and general welfare of the public," "regard [the] office as a public trust, and in the discharge of duties, be mindful of primary obligations to serve the public efficiently and effectively." (RA 476.) In addition, all state troopers "without exception and regardless of rank, assignment or duties regulatory performed, shall be subject to all duties of the Department" (RA 481), which includes the Department's role as the lead agency for the Massachusetts Internet Crimes Against Children Task Force, created to "help State and local law enforcement agencies enhance their investigative responses to offenders who use the Internet . . . or other computer technology to sexually exploit children." (RA 319-320.) As for State Police Sergeants, the "basic purpose of the work is to enforce and supervise the enforcement of criminal . . . laws, . . . provide protection and assistance to the public," and "exercise considerable independent judgment in . . . protecting the public." (RA 588, 591.)

Sergeant O'Hare's crime is directly applicable to his position as a state police trooper and violated a trooper's primary function and fundamental duty to protect life, prevent and investigate crime, and protect the reputation of the force and its members, all as embodied in case law and the State Police Rules and Regulations. See Durkin, 83 Mass. App. Ct. at 119. Sergeant O'Hare sought employment by the Commonwealth to carry out a trooper's primary duties and then acted in blatant disregard of those duties by criminally attempting to entice an underage boy into unlawful sexual acts. Id. at 119. By committing a crime threatening a minor's safety and wellbeing, Sergeant O'Hare jeopardized the integrity of his profession and the system he had sworn to uphold. Id.

Sworn to protect the public against crime, Sergeant O'Hare nonetheless sought to criminally exploit a vulnerable victim. In doing so, he repudiated his lawful obligations and abandoned his central function which is to protect the public from crime. His actions struck at the very core of the role of a trooper, that of preventing and investigating crime, protecting vulnerable members of the community, and preserving public respect in the

integrity of the State Police (and even more so as a supervisory officer). The offense cannot be separated from the nature of that position. See Bulger, 446 Mass. at 180. It would be an anomaly indeed if this offense were not viewed as contrary to a central function of a state police trooper or as violating a fundamental tenet of that public office.

CONCLUSION

The appellant State Board of Retirement respectfully requests that the judgment of the Superior Court be reversed, and that the case be remanded to that court for entry of a judgment reversing the District Court judgment and affirming the order of the Board.

Respectfully submitted,

STATE BOARD OF RETIREMENT

By its attorney,

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CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)

I, David R. Marks, hereby certify that the foregoing brief complies with all of the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure.

/s/ David R. Marks

Assistant Attorney General

ADDENDUM


PART I ADMINISTRATION OF THE GOVERNMENT

TITLE IV CIVIL SERVICE, RETIREMENTS AND PENSIONS

CHAPTER 32 RETIREMENT SYSTEMS AND PENSIONS

Section 15 Dereliction of duty by members

Section 15. (1) *Misappropriation of Funds.* ? Any member who has been charged with the misappropriation of funds or property of any governmental unit in which or by which he is employed or was employed at the time of his retirement or termination of service, as the case may be, or of any system of which he is a member, and who files a written request therefor shall be granted a hearing by the board in accordance with the procedure set forth in subdivision (1) of section sixteen. If the board after the hearing finds the charges to be true, such member shall forfeit all rights under sections one to twenty-eight inclusive to a retirement allowance or to a return of his accumulated total deductions for himself and for his beneficiary, or to both, to the extent of the amount so found to be misappropriated and to the extent of the costs of the investigation, if any, as found by the board. He shall thereupon cease to be a member, except upon such terms and conditions as the board may determine.

(2) *Initiation of Proceedings.* ? Proceedings under this section may be initiated by the board, by the head of the department, by the commission or board of the commonwealth or of any political subdivision thereof wherein the member is employed or was last employed if not then in service, or in a county by the county commissioners, in a city by the mayor, in a town by the board of selectmen, in the Massachusetts Department of Transportation by the authority, in the Massachusetts Housing Finance Agency by the agency, in the Massachusetts Port Authority by the authority, in the Greater Lawrence Sanitary District by the district, in the Blue Hills Regional School System by the system or in the Minuteman Regional Vocational Technical School District by the district. The procedure set forth in subdivision (1) of section sixteen relative to delivery of copies, statement of service thereof, notice, hearing, if requested and the filing of a certificate of findings and decision, so far as applicable, shall apply to any proceedings under this section.

(3) *Forfeiture of Rights upon Conviction.* ? In no event shall any member after final conviction of an offense involving the funds or property of a governmental unit or system referred to in subdivision (1) of this section, be entitled to receive a retirement allowance or a return of his accumulated total deductions under the provisions of sections one to twenty-eight inclusive, nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member, unless and until full restitution for any such misappropriation has been made.

(3A) *Forfeiture of rights upon conviction.* ? In no event shall any member after final conviction of an offense set forth in section two of chapter two hundred and sixty-eight A or section twenty-five of chapter two hundred and sixty-five pertaining to police or licensing duties be entitled to receive a retirement allowance or a return of his accumulated total deductions under the provisions of sections one to twenty-eight, inclusive, nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member.

(4) *Forfeiture of pension upon misconduct.* ? In no event shall any member after final conviction of a criminal offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance under the provisions of section one to twenty-eight, inclusive, nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member. The said member or his beneficiary shall receive, unless otherwise prohibited by law, a return of his accumulated total deductions; provided, however, that the rate of regular interest for the purpose of calculating accumulated total deductions shall be zero.

(5) If the attorney general or a district attorney becomes aware of a final conviction of a member of a retirement system under circumstances which may require forfeiture of the member's rights to a pension, retirement allowance or a return of his accumulated total deductions pursuant to this chapter, sections 58 or 59 of chapter 30 or section 25 of Chapter 268A, he shall immediately notify the commission of such conviction.

(6) If a member's final conviction of an offense results in a forfeiture of rights under this chapter, the member shall forfeit, and the board shall require the member to repay, all benefits received after the date of the offense of which the member was convicted.

(7) In no event shall any member be entitled to receive a retirement allowance under sections 1 to 28, inclusive, which is based upon a salary that was intentionally concealed from or intentionally misreported to the commonwealth, or any political subdivision, district or authority of the commonwealth, as determined by the commission. If a member intentionally concealed compensation from or intentionally misreported compensation to an entity to which the member was required to report the compensation, even if the reporting was not required for purposes of calculating the member's retirement allowance, the member's retirement allowance shall be based only upon the regular compensation actually reported to that entity or the amount reported to the board, whichever is lower. Unless otherwise prohibited by law, such member shall receive a return of any accumulated total deductions paid on amounts in excess of the compensation actually reported, but no interest shall be payable on the accumulated deductions returned to the member.

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

SUFFOLK, ss.

NO. 2016-P-0965

STATE BOARD OF RETIREMENT,
Plaintiff/Appellant,

v.

BRIAN O'HARE, and ANOTHER,
Defendants/Appellee.

CERTIFICATE OF SERVICE

I, David R. Marks, hereby certify that on Monday, October 17, 2016, I served two copies of the Record Appendix for the State Board of Retirement, upon all parties by depositing the copies in our office depository for mailing by first class mail, postage prepaid. I hereby certify that on this day, Friday, October 21, 2016, I served two copies of the Brief of the Appellant State Board of Retirement, and Motion to File Brief and Record Appendix Four Days Late, upon all parties by depositing the copies in our office depository for mailing by first class mail, postage prepaid to:

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